ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	GC Docket No. 92-52
	)	
Reexamination of the Policy	)	
Statement on Comparative	)	
Broadcast Hearings	)	

To: The Commission

COMMENTS OF SUSAN M. BECHTEL

1. Attached and incorporated herein by reference are copies of the opening brief and reply brief of Mrs. Bechtel filed with the Court of Appeals in the matter of Commission action upon remand of Bechtel v. FCC, 957 F.2d 873 (D.C.Cir. 1992). While Mrs. Bechtel supports meaningful long-term ownership and management of broadcast stations, for reasons detailed in these briefs, a three-year holding period for parties who are not qualified to manage their own stations will yield no more "integration" success stories that a one-year holding period.

2. The new rules adopted by the Commission in this matter, whatever they may be, should not be applied to applications on file prior to the date of adoption of those rules. Such rules will constitute a substantive change in the law of the obligations, burdens and duties of applicants before the Commission. There is nothing in the general rulemaking powers of the FCC, 47 U.S.C. §303(r), or in the rulemaking powers of the FCC relative to broadcast applications, 47 U.S.C. §§308-309, which authorizes the Commission to change the law by adopting and applying new rules retroactively. Absent Congressional authority, the agency does not have the power to make such a

change in the law on its own motion. Bowen v. Georgetown University Hosp., 488 U.S. 204, 109 S.Ct. 468 (1988).

3. In addition, such action would violate the Administrative Procedure Act, which defines rules within the meaning and scope of that act as: "...an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency..." 5 U.S.C. §551(4) [emphasis supplied]. See, the 1947 Attorney General's Manual interpreting the Administrative Procedure Act, which states that rules "must be of future effect, implementing or prescribing future law." AG's Manual at 13 [emphasis in original]; see, also, Bowen v. Georgetown University Hosp., supra, Concurring Opinion by Justice Scalia.

Respectfully submitted,

Gene A. Bechtel

Bechtel & Cole, Chartered
Suite 250
1901 L Street, N.W.
Washington, D.C. 20036
Telephone 202-833-4190
Telecopier 202-833-3084

Counsel for Susan M. Bechtel

October 13, 1993

THIS CASE HAS BEEN SCHEDULED FOR
ORAL ARGUMENT ON OCTOBER 14, 1993.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 92-1378

SUSAN M. BECHTEL,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

ANCHOR BROADCASTING LIMITED PARTNERSHIP,
Intervenor.

On Appeal of Orders of the
Federal Communications Commission

BRIEF OF APPELLANT SUSAN M. BECHTEL

GENE A. BECHTEL
HARRY F. COLE

Bechtel & Cole, Chartered
1901 L Street, N.W. - Suite 250
Washington, D.C. 20036
(202) 833-4190

Counsel for Susan M. Bechtel

Initial brief filed: May 28, 1993
Final brief filed: August 30, 1993

CERTIFICATE AS TO
PARTIES, RULINGS AND RELATED CASES

The following information is submitted in compliance with Rule 11(a) of this Court.

A. Parties and Amici

(1) Parties appearing below are Anchor Broadcasting Limited Partnership (Anchor), Susan M. Bechtel (Mrs. Bechtel) and, although contested by Mrs. Bechtel as no longer being a party in interest, Galaxy Communications, Inc. (Galaxy).

(2) Counsel represents Mrs. Bechtel, an individual.

(3) Parties in this Court are Mrs. Bechtel (appellant in No. 92-1378 and No. 93-1264), Galaxy (appellant in No. 93-1265), Anchor (intervenor) and the Federal Communications Commission (appellee). To my knowledge there are no amici.

B. Rulings Under Review

Appellants seek review of the FCC's Memorandum Opinion and Order released March 10, 1993, Anchor Broadcasting Limited Partnership, 8 FCC Rcd. 1674, and the FCC's Memorandum Opinion and Order released July 21, 1992, Anchor Broadcasting Limited Partnership, 7 FCC Rcd. 4566.

C. Related Cases

This case has previously been before this Court in Bechtel v. FCC, 957 F.2d 873 (1992)(No. 91-1112 and No. 91-1116).

To my knowledge, one other case is before this Court involving the same issues (i.e., whether the FCC's "integration criterion" is unreasoned, arbitrary and capricious in circumstances where this has been challenged below prior to Bechtel v. FCC and alternative evidence has been offered and rejected by the FCC): Mazo Radio Co. v. FCC, No. 92-1659 and consolidated cases, specifically, the appeal of the Georgia Public Telecommunications Commission, No. 93-1011.

I believe there are several other cases pending before this Court involving some of the same issues (i.e., whether the FCC's integration criterion" is unreasoned, arbitrary and capricious in circumstances where this was not challenged below prior to Bechtel v. FCC and there was no offer and rejection of alternative evidence). These cases may include Golden Shores Broadcasting, Inc. v. FCC, No. 92-1572, Playa del Sol Broadcasters v. FCC, No. 92-1386, and Caldwell Broadcasting Limited Partnership v. FCC, No. 92-1343. The FCC (appellee) is in the position to identify all such cases currently pending before this or other Courts.

Except as indicated above, I am not aware of any other related cases before this Court or any other Court.

I certify that the foregoing information is true and correct to the best of my knowledge based on information reasonably available at this time.

Gene A. Bechtel

Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
Telephone 202-833-4190
Telecopier 202-833-3084

Counsel for Susan M. Bechtel

August 30, 1993

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

OTHER

* Denotes authorities principally relied upon

STATEMENT OF ISSUES PRESENTED

Whether the Federal Communications Commission (FCC or Commission) has complied with the order of this Court requiring the FCC to address in a meaningful way Mrs. Bechtel's argument that the Commission's "integration of ownership and management" policy, as applied to her application, is arbitrary, capricious and a failure of reasoned agency decision-making.

STATUTES AND REGULATIONS

This case involves a comparative hearing on mutually-exclusive applications to the FCC for a construction permit for a broadcast station governed by the public interest provisions of the Communications Act of 1934, §309, as amended, 47 U.S.C. §309 (the Act), reproduced in the Statutory Appendix.

JURISDICTION

This Court has jurisdiction pursuant to §402(b) of the Act, 47 U.S.C. §402(b), also reproduced in the Statutory Appendix, to hear an appeal taken by a party whose application for construction permit has been denied by the FCC.

STATEMENT OF THE CASE

This case has previously been before this Court. Bechtel v. FCC, 957 F.2d 873 (1992). For the Court's ease of reference, and to highlight the FCC's continuing and repeated refusal (even after the Court's initial remand) to address the issues raised by Mrs. Bechtel, we offer a brief history of Mrs. Bechtel's application.

Initial decision by the agency below in February 1991 (prior to appeal to and remand by this Court). This case involves a comparative hearing for a construction permit for a new FM radio

station in Selbyville, Delaware, which is located in the Ocean City, Maryland area and in the Salisbury-Ocean City radio market. When the case came before the FCC for decision, there were four competing applicants for the permit. JA 7. Three of them, including the ultimate winner, Anchor Broadcasting Limited Partnership (Anchor), proposed "integration of ownership and management" under a criterion employed by the FCC to predict the likelihood of effectuation of programming service in the public interest. JA 7. The remaining applicant, Susan M. Bechtel, eschewed proposing such "integration," but offered into evidence, as predictive of the likelihood of effectuation of programming service in the public interest, a proposal to hire and rely on an experienced general manager, also to rely on advice from two other radio station general managers who are her friends, as well as advice from her husband, a long-time communications attorney, giving ownership oversight of the operation of the station while living both at her regular residence in Potomac, Maryland and at her summer and vacation residence within the service area of the station. JA 7, 96-99, 283-85. Mrs. Bechtel, alone among the four applicants, has a history of part-time vacationing and residence in the service area for a period of some 40 years. JA 7-14, 96-99. Mrs. Bechtel proposed a transmitting facility that would serve 21% more population than that proposed by Anchor. JA 1.

In the adjudication process before the FCC, only the three applicants proposing integration were considered, and there was vacillation in the choice of a winner. The ALJ chose Anchor, the

Review Board (by a two to one vote) chose another applicant, and the full Commission reverted to Anchor as its choice. JA 1-6, 7-20, 21-24. This vacillation stemmed from differing views of the facts and related legal analysis under the integration criterion. Id. Mrs. Bechtel's evidence of an alternative ownership-management arrangement to demonstrate likelihood of effectuation of programming service in the public interest was rejected and, at all stages before the agency, her argument that the integration criterion is unreasoned, arbitrary and capricious was ignored. JA 6, 14 (n. 3), 24.

Throughout the briefing process before the ALJ, the Review Board and the full Commission, Mrs. Bechtel alleged that the integration process had been ineffectual. She gave an illustration of a failure of the process as reflected in the case of Debra D. Carrigan, 100 F.C.C.2d 721 (1985), review denied, 104 F.C.C.2d 826 (1986), affirmed on other grounds sub nom. Bernstein/Rein Advertising, Inc. v. FCC, 830 F.2d 1188 (D.C.Cir. 1987). JA 131-174. She invited the other parties to come forward with evidence of any "success stories" of the operation of the integration criterion (in the sense that ownership-integration relied upon in granting an application in fact was carried out on a permanent or at least long-term basis beyond the mandatory one-year holding period). JA 131-74, 319-20, 329-30. No party -- nor the ALJ -- nor the Review Board -- nor the full Commission -- ever cited any such "integration success story."

Previous appeal to and remand by this Court in January 1992.

Mrs. Bechtel brought an appeal to this Court, challenging the lawfulness of the integration criterion as applied to her application and the failure to grant the permit to her on the strength of her superior signal coverage. Another disappointed applicant, Galaxy Communications, Inc. (Galaxy) appealed as well. In her brief before the Court, Mrs. Bechtel again challenged the FCC and opposing parties to come forward with evidence of any "integration success stories." JA 228-29. Again, no one did. Mrs. Bechtel alleged that the Commission had never surfaced with any study of its records to determine if the integration criterion had resulted in any increase of the ownership of the favored types of integrated owners such as persons with local ties, minorities and women, to determine if the integration criterion had been carried out successfully at all, or even to make the simple and readily available statistical check to determine if, and the extent to which, parties who had received a permit based on an integration proposal actually owned the promised interest and for what period of time. JA 231-32. The FCC did not respond with any reference to any such studies of the records in its possession or efforts to elicit the requisite information from its licensees of broadcast stations who had received permits based upon their integration promises. JA 175-210.

In January 1992 this Court rendered its decision in Bechtel v. FCC, denying the appeal of Galaxy but granting the appeal of Mrs. Bechtel, reversing and remanding the case to the agency with instructions that it deal with the substance of the attack which

Mrs. Bechtel had made on the lawfulness of the integration criterion as applied to her application and alternative evidentiary offer.[1]

FCC rulemaking notice in April 1992. In an obvious response to the Court's remand (in January 1992), the Commission issued a rulemaking notice proposing for comment (among other things) the elimination or modification of the integration criterion. Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd. 2664 (1992). JA 27-30. That document, it is fair to say, expressed strong reservations regarding the continued use of the integration criterion. It stated that the Commission's experience has raised questions concerning "whether the comparative criteria have become too subjective and imprecise to be used effectively in the public interest, that comparative hearings under these criteria have often turned on relatively slight distinctions, and that difficulties with the process are exacerbated by the possibility that the criteria unduly lend themselves to manipulation by the applicants." Ibid. at 2664-65 (¶¶2, 9). The Commission cited comments critical of the process filed in another rulemaking proceeding only one year earlier, critical comments in an FCC conference regarding the adjudicatory practice, also only

---

[1] Galaxy filed a petition for writ of certiorari, which was denied. Galaxy Communications, Inc. v. FCC, 113 S.Ct. 57 (1992). Galaxy has sought to remain active in the instant appeal. Mrs. Bechtel's view is that Galaxy's role in the litigation was ended when this Court denied its appeal in Bechtel v. FCC and the Supreme Court denied cert. There are pending before this Court (a) Mrs. Bechtel's motion to dismiss Galaxy's notice of intervention in No. 92-1378 and (b) Galaxy's notice of appeal from the Commission's first and second remand decisions, No. 93-1265.

one year earlier, as well as critical comments in a law review article published in 1971, and this Court's decision in Bechtel v. FCC. Ibid. at 2664 (¶3)[2].

The Commission stated that while the concepts underlying the integration criterion set forth in the 1965 Policy Statement[3] were "not unreasonable" (the most favorable phraseology regarding the integration criterion that may be found in the document), "current circumstances warrant inquiry as to their validity in practice." Ibid. at 2665 (¶14). The Commission stated that the integration criterion had "spawned much litigation to determine if the putative control in the nominally active principal is reliable." Ibid. at 2672 (n. 10). Such litigation has led, in Commissioner Duggan's view, to "a deep cynicism about our licensing process." Ibid. at 2672. The Commission stated that the integration criterion "provides an incentive for applicants to fashion proposals which may not realistically be effectuated -- what the court, in Bechtel, referred to as 'strange and unnatural' business arrangements." Ibid. at 2665 (¶15). The Commission stated:

> Examination of potentially unreliable proposals can be a time-consuming and uncertain process. See Evergreen Broadcasting Co., 6 FCC Rcd 5599, 5600-01 ¶12 (1991); Royce International Broadcasting, 5 FCC Rcd 7063, 7063-64 ¶¶4-10 (1990), recon. denied, 6 FCC Rcd 2601 (1991),

---

[2] The Commission made this remarkable admission -- "While the records compiled in these earlier proceedings amply demonstrated the flaws in the system, they did not result in reform of the comparative criteria themselves." Ibid. at 2671 (n. 5).

[3] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965), which we shall refer to as the 1965 Policy Statement.

and called for comments on whether the criterion "should be retained or modified." Ibid. at 2665-66 (¶15). While the Commission solicited empirical evidence from commenting parties, it made no reference to the existence of any studies that it has ever made concerning the results and efficacy of the criterion in terms of local-oriented, minority and female ownership, in terms of actual real-world integration of owners as promised in the FCC hearing rooms, or even the readily available statistical check of the ownership percentage and length of time of ownership by persons having made such promises. Id.

The Commission put the rulemaking on a fast track, calling for and adhering to a schedule under which comments and reply comments were received by the agency before the end of June 1992. In the notice of proposed rulemaking, the FCC indicated that its reexamination of comparative criteria was "overdue" and that it planned to implement what it called "the revised system" "promptly." Ibid. at 2664, 2669 (¶¶4, 41). As FCC rulemaking proceedings go, the volume of comments and reply comments was quite manageable for the Commission to handle, perhaps 7 or 8 linear inches of paper in all. Certainly, the details of the comments could have been considered and all issues resolved by the Commission and its staff within a short period of time, i.e., a few weeks or at the most a few months. For sure, little time was required to read about the "integration success stories" recited in the comments that were filed, since no success stories were recited to the Commission in support of its integration criterion which has

been in effect in one form or another for nearly a half century now.[4] None.

Since the filing of the comments and reply comments on a fast track before the end of June 1992, nothing has happened in the rulemaking proceeding. Nothing. This is so even though the Commission and its staff have found the time during the past approximately one year period to issue two decisions in the remand of Bechtel v. FCC involving the very same subject. This course of conduct is consistent with a cynical strategy on the part of the FCC to attempt to secure judicial affirmance of the denial of Mrs. Bechtel's application (with the explanation that the FCC is dealing with the Court's concerns in a rulemaking proceeding based upon industry and public comments, etc. etc.) and then later to conclude that rulemaking proceeding while no longer under continued surveillance by this Court in the Bechtel litigation.[5]

The first decision of the FCC on remand in July 1992. On March 16, 1992 the Commission issued an order requesting comments on "what further action should be taken" in light of the Court's remand. JA 25-26. Those comments were due shortly thereafter,

---

[4] This statement is based upon our examination of the comments and reply comments filed in the rulemaking proceeding. If we have missed any reference to any such success story, we invite the FCC to correct our statement in its appellee's brief.

[5] Following announcement of the second Bechtel remand decision, still without any action in the rulemaking proceeding, Broadcasting & Cable, formerly Broadcasting magazine -- an industry weekly generally viewed as a source of reliable information from within the Commission -- referred to this rulemaking as "alive (if just barely)." March 8, 1993, at 38. JA 446.

i.e., March 30, 1992. JA 25-26, 235, 255. Given the short time period and the wording of the order, this request, fairly read, was for comments on how to proceed further before the Commission, not for briefs addressed to the substance of the Court's remand. In that vein, Mrs. Bechtel filed comments two pages in length suggesting that the FCC schedule the filing of briefs by all parties concerning the substance of the issues on remand. JA 255-56. The Commission took no action on this suggestion, and proceeded to issue a decision on the merits of the remand issues without any such briefing schedule. Anchor Broadcasting Limited Partnership, 7 FCC Rcd. 4566 (1992). JA 27-30. In our view, this was an astonishingly cavalier way for the Commission to deal with a remand by the United States Court of Appeals for the District of Columbia Circuit.[6]

The serious student of the FCC's manner of proceeding in this matter will want to compare the text of the notice of proposed rulemaking, issued in April 1992, described earlier at pages 5-7, with the text of the FCC's decision on the remand issues only two months later in July 1992. The remand decision states that the FCC has not been persuaded by Mrs. Bechtel that the validity of the "integration" criterion has been undermined or that use of the

---

[6] While the FCC's remand decision indicates that the Commission received comments from the parties, it does not disclose the restricted nature of its request for comments or that the comments of Mrs. Bechtel consisted of a two-page proposal for the FCC to establish a briefing procedure. Ibid. at 4566, 4569 (¶2 and n. 2). The way this decision is worded, the Court would have the impression that the FCC below made its decision following a full briefing of the issues by the interested parties. This was not the case.

criterion is not in the public interest. Ibid. at 4567 (¶11). The remand decision states that it was Mrs. Bechtel's burden to show that the criterion had been undermined, and that Mrs. Bechtel failed to do so. Ibid. at 4567 (¶12). The remand decision states that Mrs. Bechtel failed to present any basis for the notion that applicants might manipulate the process. Ibid. at 4567 (¶14). And if anyone should try to manipulate the process, never fear because, as the remand decision states:

> We do not hesitate to deny integration credit to proposals that we find unreliable or made in bad faith. See Evergreen Broadcasting Co., 6 FCC Rcd 5599, 5600-01 ¶12 (1991); Royce International Broadcasting, 5 FCC Rcd 7063, 7063-64 ¶¶4-10 (1990), recon. denied, 6 FCC Rcd 2601 (1991). Id.

These are the very same citations set forth in the notice of proposed rulemaking issued in April 1992, quoted verbatim supra at page 6, down to the identical page and ¶ numbers, except the sentence for which they are cited has been changed. In the rulemaking notice in April 1992, the FCC cited these cases in support of the statement that "Examination of potentially unreliable proposals can be a time-consuming and uncertain process." In the remand decision in July 1992, written for this Court's consumption, these cases stand for this agency's ability to -- without hesitation -- weed out and deny the unworthy integration proposals that come before it.

The student of these two documents will observe numerous other shifts in language illustrating the intellectual dishonesty that is at work here. The April 1992 rulemaking notice was replete with remarks about the problems associated with the integration

criterion, as we have indicated supra at pages 5-7, and called for comments regarding whether the criterion should be retained at all or modified. The July 1992 remand decision omits all of the numerous remarks about the problems with the integration criterion and refers to a "reexamination" of the criterion without any reference to the breadth of the proposal to include abandonment of the system altogether.

On this score, the intention and mind set of the FCC are clearly demonstrated by an understanding of an ellipsis inserted in the July 1992 remand decision. Compare the Commission's original language, in its April 1992 notice of proposed rulemaking, with the way that original language was quoted in the FCC's July 1992 opinion:

Notice of Proposed Rulemaking 7 FCC Rcd. 2664 (April, 1992), ¶2	Memorandum Opinion and Order 7 FCC Rcd. 4566 (July, 1992), ¶18
Given *the passage of time and the dramatic changes that have occurred in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting*, **a reexamination of the comparative criteria is eminently warranted. Moreover, our experience with some of these criteria over time raises questions of whether these criteria have become too subjective and imprecise to be used effectively in the public interest. Comparative hearings, in which these criteria are applied, tend to be protracted and have often turned on relatively slight distinctions among the applicants. The difficulties with this process are exacerbated by the possibility that the comparative criteria may unduly lend themselves to manipulation by the applicants.** [italics added to reflect text quoted in July 1992 order; boldface added to reflect text *not* quoted in that order]	In our Rule Making, we have undertaken to reexamine the comparative criteria in light of "*the passage of time and the dramatic changes that have occurred in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting....*" 7 FCC Rcd at 2664 ¶ 2 [ellipsis in original, italics added to reflect text quoted from Notice of Proposed Rule Making].

Thus, the remand decision in July 1992 cross references to

the opening ¶2 of the April 1992 rulemaking notice with the obvious intent to give this Court the flavor of the purpose of that rulemaking, but the FCC quotes only the part about changing broadcast marketplaces and technologies, with an ellipsis and quotation marks to end the quote, and the FCC then deletes all of the references to the various problems with the comparative criteria that immediately follow the material it quotes.

This Court's decision in the Flagstaff case in December 1992. Mrs. Bechtel noted an appeal in this Court from the FCC's July 1992 remand decision, but no briefs had been filed with regard to that appeal when, in December 1992, this Court handed down its decision in Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (D.C. Cir. 1992). There, largely on the basis of Bechtel v. FCC, the Court reversed and remanded an FCC decision which, in an integration analysis applied to a non-stock corporation, had rejected that applicant's alternative evidentiary showing. After dealing with the Flagstaff matter for about ten pages or so, the Court stated, "[w]e are aware that Ms. Bechtel, on remand, received no more than a summary dismissal of her claims after a cursory review of the history of the integration criterion." 979 F.2d at 1571.

The second decision of the FCC on remand in March 1993. Following the Court reversal in Flagstaff (December 1992), the Commission issued a second remand decision embellishing upon its first remand decision. Anchor Broadcasting Limited Partnership, 8 FCC Rcd. 1674 (1993). We shall discuss the failings of that

document in detail in our argument, infra. That document provides historical information about the integration criterion and some additional verbiage in support of the criterion, but, in our view, makes no more meaningful effort to deal with the concerns of the Court in Bechtel v. FCC than did the first decision on remand. This second remand decision, like the first, is silent concerning the problems repeatedly referred to and detailed in the rulemaking notice, and treats the rulemaking as a routine and benign activity which may or may not result in any change in the system, a conclusion that the Commission will reach at some unknown time in the future. This second remand decision, like the first, makes no mention of the absence of any evidence of an "integration success story" notwithstanding its call for public comment from the entire broadcasting industry on the subject. This second remand decision, like the first, makes no mention of the continuing absence of any studies by the FCC itself based on its own records or based on any inquiries of its licensees regarding the efficacy of the "integration" criterion in actual practice. This second remand decision, like the first, is an exercise in semantics and legal prose without substance or meaning.

Two other similar cases in which the applicants have challenged the integration criterion and have offered alternative evidence of ownership-management demonstrating the likelihood of effectuation of program service in the public interest. To our knowledge, there are two other cases similar to the Bechtel and Flagstaff cases in which the lawfulness of the integration